Supreme Court, U.S.
FILED
AUG 30 1991
OFFICE OF THE CLERK

No. 91-93

In The

Supreme Court of the United States

October Term, 1991

Senator FRED A. RISSER and
Representative DAVID M. TRAVIS,

Petitioners,

vs.

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

REPLY TO BRIEF IN OPPOSITION

FREDERICK B. WADE
Counsel of Record

Suite 804
122 West Washington Avenue
Madison, WI 53703
(608)255-5111

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Baker v. Carr, 369 U.S. 186 (1962) 5

Davids v. Akers, 549 F.2d 120 (9th Cir. 1977) 6

State ex rel. Kleczka v. Conta, 82 Wis.2d 679, 264 N.W.2d 539 (1978) 8

State ex rel. Sundby v. Adamany, 71 Wis.2d 118, 237 N.W.2d 910 (1976) 8

State ex rel. Wisconsin State Senate v. Thompson, 144 Wis.2d 429, 424 N.W.2d 385 (1988) 8

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 7

WISCONSIN CONSTITUTION

Article V, sections 1 and 4 7

MISCELLANEOUS

Dickinson, J., *Letters From a Farmer in Pennsylvania* in McDonald, F., ed., *Empire and Nation* (1962) 9

Elliot, J., *Debates in the Several State Conventions* (1901) 7

McMaster, J. and Stone, F., eds. *Pennsylvania and the Federal Constitution* (1888) 7

Story, J., *Commentaries on the Constitution* (1851) 2

Syrett, H., ed., *The Papers of Alexander Hamilton* (1961) 7

No. 91-93

In The

Supreme Court of the United States

October Term, 1991

Senator FRED A. RISSER and
Representative DAVID M. TRAVIS,

Petitioners,

vs.

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

1. The Petition presents important questions of federal law that warrant the attention of this Court. In fact, contrary to the respondent's brief (Br. 5), there are few questions, if any, that could be of greater importance. Those questions ask whether the Constitution, or the tradition of legislative freedom that underlies the doctrine of absolute legislative immunity, secures the right of the governed to give or withhold consent to the enactment of statutes.

The petitioners have demonstrated, by uncontroverted evidence, that *consent* to the enactment of statutes, given either in person, or by a majority of the legislators present and voting in a representative body, was the very essence of the concepts of liberty and self-government that gave birth to our nation. App. 44a-67a, 72a-83a; *See* Pet. 9-15. The respondent, like each of the lower courts that has dealt with this case, has chosen to ignore that evidence, and to treat the principle of *consent* to statute law as if it is no part of the history and tradition of our people.

Moreover, Wisconsin's repudiation of the principle of consent is not merely of local or regional importance. If one State may abandon the principle of consent to statute law, which Justice Story has described as a " 'fundamental principle of a free government, and especially of a republican government,' " any State may do so. *See* J. Story, *Commentaries on the Constitution*, 396 (1851) *quoted at* App. 64a-65a.[1]

2. The respondent asserts that the challenged vetoes, which are summarized at App. 92a-94a, are "standard fare throughout the nation." *See* Br. 4. There is no color of merit in the assertion. It does not appear that any other Governor in the nation has the power to compose

---

[1] On August 8, 1991, Governor Thompson exercised 457 "part" vetoes, before giving his approval to the remnants of the 1991-93 state budget. A number of those vetoes have created provisions of statute law without the consent of the Legislature. The Governor has now used a total of 1,146 part vetoes of budget bills since 1987, compared to a total of 661 part vetoes for the five Governors who served between 1965 and 1987.

and enact provisions of statute law without the consent of the representatives of the people in the Legislature.

3. There is no color of merit to the claim that this litigation embraces more than "creative" vetoes, which are challenged in this action because they "create" provisions of statute law without the consent of the Legislature. *See* Br. 4. As the Court below recognized, this case arose because the Governor exercised "the partial veto power to create a law that the legislature did not consider, let alone enact . . . . " App. 11a.

The distinction between "creative" and "negative" vetoes is carefully delineated in the Petition. *See* Pet. 3-4. A "creative" veto has the effect of composing and *enacting* a provision of statute law that is either contrary to the manifest intent of the corresponding provision in the text of the enrolled bill, or that differs in a material respect from the corresponding provision in the text of the enrolled bill that the Legislature did consider and did agree to pass. *Id.*

4. The respondent repeats the assertion of the Court of Appeals that there is no merit in the petitioner's claims (Br. 5, n.1), but that assertion should be discounted. The claims described by the panel bear no resemblance to the questions that the petitioners presented. In fact, the word "*consent*", and the concept of "consent," do not even appear in the opinion of the Court below. *See* App. 1a-13a.

The Court mischaracterized the due process claim as a contention that "the [governmental] power that a public official has by virtue of his office is a form of 'liberty.' " *Compare* Pet. 20-22 *with* App. 11a. In fact, the claim rests

on the premise that the petitioners have a personal right, in their capacity as qualified voters who actually voted for representation in the legislature, to give or withhold *consent* to the enactment of statutes through a vote in a representative body, in which *consent* to enactment is expressed by at least a majority of the votes cast by quorum of the elected representatives. Pet. 5 n.2, 9-15, 20-22.[2]

Similarly, the Court disparaged the Guarantee Clause claim as an attempt to prove, by "analogy," that the government of Wisconsin is "monarchical or aristocratic" and that the Governor is comparable to "a hereditary prince" or "a dictator." App. 7a-8a. In fact, the petitioners contended, on the basis of historical evidence (*See* App. 56a-65a and 72a-83a), that Wisconsin has exchanged a "republican" *prescription for legislative action* for one that is "anti-republican," insofar as the executive may compose and enact statutes that do not have the *consent* of the representatives of the people in the Legislature. *Compare* Pet. 22-25 *with* App. 7a-8a.

Finally, the Court of Appeals treated the Equal Protection and First Amendment claims *as if* they involved nothing more than "the allocation of power between two branches of government." App. 9a-10a. In reality, these claims rest on the premise that the requirement of a two-thirds vote – for the purpose of rejecting a provision of statute law that has been composed and enacted by

---

[2] As stated, the claim recognizes that qualified electors did not have an opportunity to exercise the personal right to give or withhold consent directly by voting in a referendum.

means of a "creative" veto – results in an unequal allocation of power *among members of the Legislature* (and the citizens of the districts that they represent). *Compare* Pet. 25-28 *with* App. 9a-10a. The Court below ignored the premise – namely, that the State's decision to establish *a legislature* gives each citizen a constitutionally protected right to participate in the legislative decision to give or withhold *consent* to the enactment of statutes *on an equal basis with other citizens. Id.*

5. The respondent's brief does not concede that deprivation of the right to give or withhold consent is the issue. As a result, it does not contain any substantive response to the arguments and evidence that the petitioners presented.

The brief ignores the petitioners' claim that they have a personal liberty interest in giving or withholding consent to the enactment of statutes, either personally, or through their representatives in the Legislature. In addition, it makes no attempt to refute any of the evidence that the Founders considered popular or legislative consent to the enactment of statutes to be a " 'fundamental principle of a free government, and especially of a republican government . . . . ' " App. 64a-65a; *See* Pet. 9-12; App. 44a-67a; App. 72a-83a.[3]

---

[3] Contrary to the respondent (*See* Br. 6-7), *Baker v. Carr*, 369 U.S. 186 (1962), makes clear that there must be a case-by-case inquiry to determine whether there is a political question that renders a particular claim non-justiciable. While *Baker* recognizes that Guarantee Clause claims have often involved political questions, it does not foreclose the possibility that some will not. *Id.* at 222-223 n. 48, 229.

In the context of the First Amendment and the Equal Protection Clause, the respondent relies (Br. 9) on *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977). However, that case rests on the premise that the complaining legislators had "*the usual right* of a member to speak *and vote* upon matters that come before the House . . . . " (emphasis added) *Id.* In other words, they had "*the usual right*" to give or withhold *consent* to a proposed course of action by a majority of the votes cast. Because deprivation of that "*usual right*" is precisely what gives rise to the petitioner's claims, there is no color of merit to the assertion that *Davids v. Akers* is relevant.

6. The respondent asserts that the petitioners have "sued the wrong person" because the Governor is entitled to legislative immunity. Br. 5. However, the brief does not contain any substantive response to the petitioners' argument that the immunity does not apply because the challenged vetoes fall outside the sphere of *legitimate* legislative activity. *Compare* Pet. 15-18 *with* Br. 5-6.

The Founders understood that an executive cannot be given a "power of legislation" without repudiating the fundamental principle that statutes require the *consent* of either the people themselves, or a majority of the legislators present and voting in a representative body. As James Iredell explained, prior to becoming a Justice of this Court:

> "The President has no power of legislation. If he does not *object*, the law passes by a bare majority; and if he *objects*, it passes by two thirds [assuming that the veto is overridden]. His

> power extends only to cause it to be *reconsidered. . . .* "

(emphasis added) 4 J. Elliot, *Debates in the Several State Conventions,* 27 (1901). Mr. Iredell concluded:

> "whether a law *passes* by a bare majority, or by two thirds, (which are required to *concur after* he shall have stated objections,) what gives active operation to it is, the will of the senators and representatives."

(emphasis added) *Id.; See* Pet. 17. In other words, it is the *consent* of the representatives of the people in the legislature that is necessary to give a statute "any validity, or binding force. . . . " *See* 1 H. Syrett *ed., The Papers of Alexander Hamilton* 105 (1961).

Without the consent of the people, given either in person, or through their representatives, there can be no legitimate exercise of legislative power. As James Wilson put it, a proposal becomes law "by the authority of the two houses of the legislature." J. McMaster and F. Stone, eds., *Pennsylvania and the Federal Constitution,* 335 (1888).[4]

---

[4] The Wisconsin Constitution gives the Governor "[t]he executive power," and makes him responsible for seeing "that the laws be faithfully executed." Wis. Const. Art. V, sections 1 and 4. Accordingly, even if the respondent is entitled to immunity for acts performed in a legislative capacity, he is still a proper defendant. The Complaint seeks to nullify statutes that have been composed and enacted by "creative" use of the veto power (*See* App. 2a-3a), and that remedy would be equivalent to a prospective injunction against their enforcement and administration. *See Supreme of Virginia v. Consumers Union,* 446 U.S. 719, 736 (1980).

7. The respondent's brief emphasizes (Br. 3) that Senator Risser and Representative Travis "were the lead sponsors" of the 1990 constitutional amendment, which prohibits the Governor from "creat[ing] a new word by rejecting individual letters in the words of the enrolled bill." App. 85a. However, each of the petitioners testified, at his deposition, that the amendment did not go as far as he desired. *See* Risser Dep. 34; Travis Dep. 17.

Senator Risser testified that the amendment represented "a consensus of those of us who were interested. . . . " Risser Dep. 34. He added that "the consensus arrived at was that the public certainly could understand that creating new words by striking letters of old words was far and beyond any comprehension – even though our state Supreme Court said it was all right. . . . " *Id.* Representative Travis explained that "a political decision" was made as to what was necessary to get the amendment "through two houses of the legislature two different times and pass a statewide referendum." Travis Dep. 17.

8. The respondent implies (Br. 3-4) that a political remedy is feasible. However, the Wisconsin Supreme Court has repeatedly affirmed that the Governor may make "creative" use of the part veto. *See State ex rel. Wisconsin State Senate v. Thompson,* 144 Wis.2d 429, 439-443, 447-451; 424 N.W.2d 385, 388-390, 392-393 (1988). Governors of both major parties have used the power as a means of creating statutes that do not have the consent of the representatives of the people in the Legislature. *Id.; State ex rel. Sundby v. Adamany,* 71 Wis.2d 118, 237 N.W.2d 910 (1976) (Democrat Patrick Lucy); *State ex rel. Kleczka v. Conta,* 82 Wis.2d 679, 264 N.W.2d 539 (1978) (Democrat Martin Schreiber). Attorney Generals of both parties have

defended the practice in this case.[5] And the Legislature as a whole, in proposing the constitutional amendment that was adopted in 1990, failed to comprehend that there is an irreconcilable conflict between "creative" use of the veto and the principles of liberty and self-government that gave birth to our nation.

As John Dickinson observed, in the third of his *Letters From a Farmer In Pennsylvania*, "usurpations, which might have been successfully opposed at first, acquire strength by continuance, and thus become irresistible." F. McDonald, *ed.*, *Empire and Nation*, 16 (1962). There is no reasonable likelihood of a political remedy that will restore the principle that no statute may be enacted without the *consent* of either the people themselves, or a majority of the legislators present and voting in a representative assembly.

CONCLUSION

For the reasons set forth above, and in the Petition, the petitioners respectfully request that the Petition be granted.

Respectfully submitted,

FREDERICK B. WADE
Counsel of Record

Suite 804
122 West Washington Avenue
Madison, WI 53703
608-255-5111

[5] The respondent's brief is the first submitted in this action by Attorney General James Doyle, a Democrat who defeated his Republican predecessor in 1990.